

No. 13-0932 PH

Zulpo filed his complaint on May 29, 2013. The Board filed its answer on June 19, 2013. On July 30, 2013, the Board filed a motion to compel Zulpo to respond to the Board's interrogatories and request for production of documents and to deem the Board's request for admissions admitted. We gave Zulpo until August 12, 2013, to file a response, but he filed nothing. We issued an order on August 16, 2013, ordering Zulpo to respond to the Board's interrogatories and request for production of documents within thirty days and ordering that the Board's requests for admission were deemed admitted. Zulpo did not respond to the Board's discovery requests. On October 3, 2013, the Board filed a motion for sanctions because Zulpo

had not responded to the Board's discovery requests. We gave Zulpo until October 8 to respond, but he filed nothing.

We may impose sanctions under 1 CSR 15-3.425(1):

The commission may impose a sanction on any party for conduct including, without limitation, such party's failure to:

(A) Comply with any order or rule of the commission, including failure to file an answer[.]

Possible sanctions include, but are not limited to:

(A) Striking all or any part of the party's pleading;

(B) Deeming all or any part of an opposing party's pleading admitted; or

(C) Barring or striking all or any evidence on any issue.^[1]

We determine the appropriate sanctions in each case based on the specific facts of that case.²

Here, our August 16 order placed Zulpo on notice that he would face sanctions if he did not reply to the Board's discovery requests. Zulpo chose not to respond. We therefore grant the Board's motion for sanctions for failure to comply with our order of August 16, 2013.

Zulpo has shown that he has no interest in further participating in this case or challenging the Board's decision to deny him a pharmacy license. We therefore employ the full range of sanctions against Zulpo. We order his pleadings stricken, we deem all of the Board's answers admitted, and we bar him from presenting any evidence.

We may grant a motion for involuntary dismissal based on a preponderance of the admissible evidence.³ We may involuntarily dismiss the complaint on our own motion.⁴

Because we have stricken Zulpo's petition and deemed the facts in the Board's answer admitted, we base our findings of fact on the Board's answer.

¹ 1 CSR 15-3.425(2).

² 1 CSR 15-3.425(3).

³ 1 CSR 15-3.436(1) and (3).

⁴ 1 CSR 15-3.436(1).

Findings of Fact

1. Zulpo filed a pharmacy technician registration application (“application”) with the Board.
2. On his Application, Zulpo admitted that he had been finally adjudicated guilty or entered a plea of guilty or nolo contendere in Missouri, any other state, or the United States, to a crime relating to drugs, narcotics, controlled substances, or alcohol.
3. On March 4, 2013, Zulpo pled guilty in the Circuit Court of St. Louis County to the Class C felony of possession of a controlled substance.
4. The Board reviewed Zulpo’s application and his criminal history at its board meeting in April 2013, denied his application, and placed him on the Missouri Employment Disqualification List for a period of five years.

Conclusions of Law

We have jurisdiction over this case.⁵ The applicant has the burden to show that he or she is entitled to licensure.⁶ When an applicant for licensure files a complaint, the agency’s answer provides notice of the grounds for denial of the application.⁷ We decide the issue that was before the Board, which is the application.⁸ We exercise the same authority that has been granted to the Board.⁹ Therefore, we simply decide the application *de novo*.¹⁰

The Board may deny a pharmacy technician license as follows:

1. The board may refuse to issue any certificate of registration or authority, permit or license required pursuant to this chapter for one or any combination of causes stated in subsection 2 of this section[.]
2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by this chapter or any person

⁵ § 621.045.1. All statutory citations are to the 2012 Cumulative Supplement to the Missouri Revised Statutes unless otherwise noted.

⁶ § 621.120, RSMo 2000.

⁷ *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo.App. E.D. 1984).

⁸ *Department of Soc. Servs. v. Mellas*, 220 S.W.3d 778 (Mo.App. W.D. 2007).

⁹ *J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20 (Mo. banc 1990).

¹⁰ *State Bd. of Regis’n. for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo.App. K.C.D. 1974).

who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

* * *

(2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution under the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated under this chapter, for any offense an essential element of which is fraud, dishonesty or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed;

* * *

(6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter;

* * *

(15) Violation of the drug laws or rules and regulations of this state, any other state or the federal government [¹¹]

The Board also may refuse to issue a pharmacy technician license under a separate statute:

The board may refuse to issue a certificate of registration as a pharmacy technician to an applicant that has been adjudicated and found guilty, or has entered a plea of guilty or nolo contendere, of a violation of any state, territory or federal drug law, or to any felony or has violated any provision of subsection 2 of section 338.055. Alternately, the board may issue such person a registration, but may authorize the person to work as a pharmacy technician provided that person adheres to certain terms and conditions imposed by the board. The board shall place on the employment disqualification list the name of an applicant who the board has refused to issue a certificate of registration as a pharmacy technician, or the name of a person who the board has issued a certificate of registration as a pharmacy technician but has authorized to work under certain terms and conditions. The board shall notify the applicant of the applicant's right to file a complaint with the administrative hearing commission as provided by chapter 621.^[12]

§ 338.055.2 (15) and § 338.013.2

Section § 338.013.2 allows denial if Zulpo entered a guilty plea to a violation of a state drug law. Section 338.055.2(15) allows denial if Zulpo violated a state drug law. Here, Zulpo pled guilty to a Class C felony, possession of a controlled substance. Zulpo violated a state drug

¹¹ § 338.055.

¹² § 338.013.2

law and pled guilty to a violation of a state drug law. There is cause to deny him a license under each of these statutes.

§ 338.055.2(2)

Section 338.055.2(2) further allows for denial of a license when an applicant pleads guilty to a crime and the crime is one of moral turpitude. The statute does not define “moral turpitude,” but the concept exists in other disciplinary contexts and has been examined by Missouri courts. For example, in attorney disciplinary cases, the Supreme Court has “long defined moral turpitude as ‘baseness, vileness, or depravity’ or acts ‘contrary to justice, honesty, modesty or good morals.’”¹³

Not all criminal acts are acts of moral turpitude.¹⁴ Missouri courts have examined several types of criminal acts in license discipline cases and held that certain ones always constitute acts of moral turpitude, others may, and some never do. There are three categories of crimes:

1. crimes that necessarily involve moral turpitude, such as fraud (so-called “Category 1” crimes);
2. crimes “so obviously petty that conviction carries no suggestion of moral turpitude,” such as illegal parking (“Category 2” crimes); and
3. crimes that “may be saturated with moral turpitude,” yet do not necessarily involve it, such as willful failure to pay income tax or refusal to answer questions before a congressional committee (“Category 3” crimes).¹⁵

While Category 3 crimes require inquiry into the circumstances, crimes such as murder, rape, and fraud fall into Category 1 because they are invariably regarded as crimes of moral

¹³ *In re Duncan*, 844 S.W.3d 443, 444 (Mo. 1993)(internal citations and quotations omitted). *See also Brehe v. Mo. Dep’t of Elem. and Secondary Educ.*, 213 S.W.3d 720, 725 (Mo. App. W.D. 2007)(same definition used in discipline of teaching certificate).

¹⁴ *Brehe*, 213 S.W.3d at 725.

¹⁵ 213 S.W.3d at 725, quoting *Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954).

turpitude.¹⁶ “Courts invariably find moral turpitude in the violation of narcotic laws.”¹⁷ Zulpo’s drug conviction is a crime of moral turpitude under Category 1. There is further cause to deny him a license under § 338.055.2(2).

§ 338.055.2(6)

Section 338.055.2(6) allows denial for violation of a provision of Chapter 338 or a regulation adopted under the authority of Chapter 338. The Board has not shown that Zulpo violated any regulation or any sections of Chapter 338. Therefore, there is not cause to discipline Zulpo under this section.

Our Deference

The Board chose to deny Zulpo a license based on his controlled substance conviction. We find no reason, based on the record before us, to disturb that determination. We therefore deny Zulpo a pharmacy technician license.

Summary

We deny Zulpo a pharmacy technician license. We cancel the hearing set for October 10, 2013.

SO ORDERED on October 9, 2013.

/s/ Sreenivasa Rao Dandamudi

SREENIVASA RAO DANDAMUDI
Commissioner

¹⁶ *Brehe*, 213 S.W.3d at 725.

¹⁷ *In re Frick*, 694 S.W.2d 473, 479 (Mo. 1985). Compare *In re Shunk*, 874 S.W.2d 789, 791-792 (Mo. 1993) (possession of narcotics is crime of moral turpitude justifying attorney disbarment or other discipline).